Supreme Court, U.S.
FILED
MAY 2 1997
OFFICE OF THE CLERK

No. 96-1571

In The

Supreme Court of the United States

October Term, 1996

KARE 11, an NBC affiliate and a division of Combined Communications Corp., an Arizona corporation and Gannett Co., Inc., a Delaware corporation,

Petitioners,

vs.

C. THOMAS RYTHER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONERS

THOMAS W. TINKHAM
Counsel of Record
MICHAEL J. WAHOSKE
KATHERINE MCCONAHAY NEALON
DORSEY & WHITNEY LLP
220 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: 612-340-2600
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13PP

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. THE CENTRAL JURY INSTRUCTION IN THIS CASE TOLD THE JURY IT COULD RULE FOR PLAINTIFF IF PLAINTIFF PROVED THE ELEMENTS OF A PRIMA FACIE CASE AND OMITTED THE CRITICAL REQUIREMENT FROM *HICKS* THAT PLAINTIFF BEARS THE ULTIMATE BURDEN OF PROVING INTENTIONAL DISCRIMINATION ON THE BASIS OF AGE. . . 1

II. THE EIGHTH CIRCUIT INCORRECTLY STATED AND APPLIED THE STANDARD FOR JUDGMENT AS A MATTER OF LAW BY FINDING THAT EVIDENCE OF PRETEXT WITHOUT ANY EVIDENCE OF AGE BIAS BY THE ACTUAL DECISIONMAKERS SUPPORTED THE JURY VERDICT. 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Barber v. American Airlines, Inc., 791 F.2d 658 (8th Cir. 1986) 6, 7

Francis v. Franklin, 471 U.S. 307 (1985) 4

Manzer v. Diamond Shamrock Chemicals Co., 29 F.3d 1078 (6th Cir. 1994) 9

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 1, 2

Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (3d Cir. 1996) 9

Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328 (8th Cir. 1996) 6, 7

Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (8th Cir. 1996), *petition for cert. pending*, (No. 96-1231) 9, 10

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 1, 2, 8

RULES AND STATUTES

29 U.S.C. § 623(a)(1), (2) 8

S. Ct. R. 15.2 8

OTHER AUTHORITIES

E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Procedure* 3

This case presents the Court with an opportunity to provide much needed clarification on two important issues that have divided the lower courts as they struggle with how to interpret *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). First, lower courts need guidance on how to instruct juries in discrimination cases, as dramatically evidenced by the Eighth Circuit's even split over whether the jury instruction in this case correctly stated the proof required by the plaintiff to prevail in his age discrimination case. Second, this case presents the opportunity to clarify the proper standard and application of that standard when faced with motions for summary judgment or judgment as a matter of law. Despite respondent's protests to the contrary, this case squarely presents both issues for this Court's review.

I. THE CENTRAL JURY INSTRUCTION IN THIS CASE TOLD THE JURY IT COULD RULE FOR PLAINTIFF IF PLAINTIFF PROVED THE ELEMENTS OF A PRIMA FACIE CASE AND OMITTED THE CRITICAL REQUIREMENT FROM *HICKS* THAT PLAINTIFF BEARS THE ULTIMATE BURDEN OF PROVING INTENTIONAL DISCRIMINATION ON THE BASIS OF AGE.

The jury instruction question directly presented by this case is whether a trial court must include the *Hicks* requirement that plaintiff always bears the ultimate burden of proving intentional discrimination on the basis of age in a case where the court otherwise instructs using the burden-shifting language from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). There is no dispute that KARE asked several times for this language in the jury instruction conference and raised it in each step of

the appeal,[1] resulting in a divided opinion by the Eighth Circuit sitting en banc.

As pointed out in the petition, the jury instruction question presented here is in fact part of a larger question with which the circuits are struggling, namely, how to instruct juries in discrimination cases given the *McDonnell Douglas* paradigm and the *Hicks* interpretation laid down by this Court. While respondent spends time arguing that the larger question is not presented here, he is in fact wrong, both technically and practically.

Technically, although the issue of whether trial courts *had* to instruct using the burden-shifting language was not the focal point of the appeal, the en banc Eighth Circuit in fact actually decided that question. The en banc court ruled, 7-5, that although a previous Eighth Circuit decision had said that district courts were "constrained to instruct juries on the elements of a prima facie case," a majority of the en banc court ruled in this case that district courts were not so constrained. *See* Pet. at 19 & n. 5; Pet. App. 1 n. * and 42. Thus, the question of whether trial courts *must* instruct using the burden-shifting language was actually decided by the Eighth Circuit en banc in this case, and is available for review by this Court in this decision.

---

[1] *See* Pet. at 11; Tr. VII/170-179. As the dissenting judges noted:

> [T]he court instructed that the jury could find for Ryther if he proved the elements of a prima facie case. That is wrong under *Hicks*. . . . KARE 11 preserved the issue by objecting to this aspect of Instruction 20 and proposing alternative instructions.

Pet. App. 43-44.

Practically, what respondent fails to acknowledge is that the question of whether a trial court should or should not instruct using the burden-shifting language is the backdrop against which the instructional error in the first question presented stands out clearly. That some courts say a jury should *only* consider the ultimate question of whether the plaintiff has borne the burden of proving discrimination on the basis of an impermissible factor such as age sharply contrasts with both the trial court's failure here to give the requested instruction about that ultimate burden and the en banc court of appeal's even split on whether the instruction as given by the trial court was correct or was reversible error.

Respondent's argument that the Eighth Circuit majority opinion does not directly discuss the leading national treatise on jury instructions, E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Procedure* (hereinafter "Devitt & Blackmar"), also misses the point. The trial court said Instruction 20 "was drawn primarily" from Devitt & Blackmar, and expressly relied on Devitt & Blackmar to support its conclusion that Instruction 20 correctly stated the law. Pet. App. 107. As made clear in the petition by full quotes from both the pattern instruction and Instruction No. 20, Pet. at 9-10, 16-17, both "instructed that the jury could find for Ryther if he proved the elements of a prima facie case," Pet. App. 43, and neither instructed that the ultimate burden to prove discrimination on the basis of age remains with the plaintiff after all the shifting is done. That there may be additional errors in the pattern instruction does not correct the errors that are present in both, and it was over those common errors that the en banc court of appeals was evenly divided.

Respondent also fails to acknowledge the significance of the errors, but that did not escape the dissenting judges of the en banc court:

> The jury was erroneously instructed that it could find for Ryther if he proved the elements of a prima facie case. It was later instructed that Ryther must prove pretext for intentional discrimination. The earlier error was not explicitly corrected, and the relationship between the two conflicting instructions was not explained. As the prima facie case is easy to prove, the first instruction invited the jury to render a verdict for Ryther if it concluded KARE 11 had treated him unfairly. The second instruction limited the jury to its proper role under ADEA. Because the issue is critical to the scope of the federal statute, because the evidence of intentional age discrimination in this case was weak at best, and because we cannot know which instruction the jury obeyed, KARE 11 is entitled to a new trial.

Pet. App. 45.[2] It was thus obvious to the dissenting judges that a correct instruction would have affected the

---

[2] Where, as here, the principal instruction erroneously explains how the burden of proof can be fulfilled, a separate, general instruction merely stating that plaintiff bears the burden of proof does not cure that defect. That was one of the problems in *Francis v. Franklin*, 471 U.S. 307 (1985), that is analogous to this case. *See id.* at 319. Another was the problem, as noted in the quote from the dissenting judges above, of knowing which instruction the jury obeyed:

> Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two

outcome, and will do so if this Court remands after deciding the first question presented in petitioners' favor here.

II. THE EIGHTH CIRCUIT INCORRECTLY STATED AND APPLIED THE STANDARD FOR JUDGMENT AS A MATTER OF LAW BY FINDING THAT EVIDENCE OF PRETEXT WITHOUT ANY EVIDENCE OF AGE BIAS BY THE ACTUAL DECISIONMAKERS SUPPORTED THE JURY VERDICT.

Respondent argues that KARE mischaracterizes the Eighth Circuit's standard for ruling on judgment as a matter of law in a discrimination case, but his support is long on quotes and short on analysis. The court of appeals majority did begin by properly quoting from *Hicks*, but it then veered from the appropriate standard and revealed the fundamental error of its decision: It acknowledged serious doubt about the adequacy of the evidence other than that of pretext, stating: "It remains an open question whether, standing alone, this evidence would support the jury's verdict," Pet. App. 18, and it then stated the pivotal importance of the pretext question here: "The *ultimate* concern, of course, is whether the employer gave an honest explanation of its behavior." *Id.*

> irreconcilable instructions the jurors applied in reaching their verdict. Had the instruction [at issue] . . . been followed by the instruction "*this means that . . .*," a somewhat stronger argument might be made that a reasonable juror could not have understood the challenged language as shifting the burden of persuasion to the defendant.

Id. at 322-323 (emphasis in original).

(emphasis in original). Significantly, respondent says nothing about that part of the court's decision.

In the part of the decision that respondent does quote, the court states that evidence of pretext will not always support an inference of discrimination, leading respondent to conclude that this means the Eighth Circuit has adopted and applied the "strictest standard" of all the circuits. Br. in Opp. at 16. But a careful reading of the decision shows that even this part in fact places the Eighth Circuit with those other circuits which do not require additional evidence beyond pretext to deny a motion for judgment as a matter of law.

The majority twice states that only evidence of pretext which is "inconsistent" with an inference of intentional discrimination will result in judgment as a matter of law for the defendant. *See* Pet. App. 8, n.2 ("[T]here may be cases where the evidence of pretext is inconsistent with an inference of intentional discrimination."); Pet. App. 9 ("We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination.") By this the court is *not* saying that plaintiff must offer some evidence of discrimination beyond pretext to send the case to the jury. Instead, the court is only saying that a plaintiff will lose as a matter of law if the plaintiff's evidence of pretext is itself inconsistent with discrimination.

Proof that this is what the court of appeals majority had in mind is given by the examples it cited. *See* Pet. App. 9 n. 4. In both *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328 (8th Cir. 1996), and *Barber v. American Airlines, Inc.*, 791 F.2d 658 (8th Cir. 1986), the proof of pretext itself proved the discrimination in question was not age

based. In *Rothmeier,* the plaintiff proved the employer's proffered reason was false by showing the actual reason he was fired was that he confronted his employer about the company's alleged SEC violations. *Rothmeier,* 85 F.3d at 1337. In *Barber,* the employees' proof of pretext was that others within their own age group were given privileges denied to them. *Barber,* 791 F.2d at 660. Because in each case the plaintiffs offered a specific reason as proof of pretext that was inconsistent with age discrimination, they could not prove discrimination as a matter of law.

The Eighth Circuit's holding thus means that a plaintiff can survive judgment as a matter of law simply by showing pretext, as long as the plaintiff does not take it a step further and offer as proof of pretext a reason inconsistent with age discrimination. Ryther did not kill his own case as the plaintiffs did in *Rothmeier* and *Barber* because Ryther did not offer evidence of a specific nondiscriminatory reason why the decisionmakers decided not to renew his contract. The particular executives at KARE who decided not to renew Ryther's contract have consistently said the reason for their decision was years of poor market research results, including, importantly, the most recent survey. Ryther challenged that reason, claiming that the decision had been made before the latest market research was performed. This fact, if true, creates no inference either way that the actual decision was based on age. It therefore meets the majority's standard that the evidence of pretext is not "inconsistent" with an inference of age discrimination. It does not mean, however, that such evidence affirmatively supports a finding of intentional age discrimination.

Here, respondent has not called to the Court's attention any evidence from the record to contradict petitioner's accurate assertion that there was no evidence of age bias by the actual decisionmakers.[3] Instead, Ryther points to stray remarks made by subordinates who had no involvement with the decision not to renew Ryther's contract, and to adverse employment actions taken against other employees in dissimilar circumstances with different decisionmakers. Thus, the second question presented to which respondent objects accurately and carefully states the evidentiary circumstances in which the Eighth Circuit applied its interpretation of *Hicks*.[4]

The question presented and the text of the petition thus correctly present to the Court the facts of this case from which both the verdict and the refusal to grant judgment as a matter of law were derived: there was unrelated "age" evidence, but no evidence of age bias by the decisionmakers, i.e., no evidence that the actual decision not to renew plaintiff's contract – the "discrimination" against plaintiff – was on the basis of age. So while there was "age" evidence offered, there was no evidence that the *actual employment action against Ryther* was, in the language of the statute itself, taken *"because of such individual's* age." *See* 29 U.S.C. § 623(a)(1), (2) (emphasis

---

[3] This Court may thus take that fact as a given. S. Ct. R. 15.2.

[4] Respondent is also wrong in saying that the facts of stray comments by nondecisionmakers and actions against dissimilar employees are raised in the question presented but not otherwise addressed. They are discussed throughout the petition, both directly, *see* Pet. pp. 8-9, 12, and indirectly in the repeated emphasis that there was no evidence that the actual decisionmakers had any age bias. *See* Pet. pp. 23-25.

added), reprinted in the Petition at 2. That leaves only the prima facie case and evidence of pretext, and belies respondent's suggestion that the standard made no difference here. *See* Br. in Opp. at 16-18. Had a requirement that there be evidence beyond a mere showing of pretext actually been applied, the fact that there was no evidence of age discrimination by the decisionmakers against this individual would have mandated judgment as a matter of law for KARE.

Thus, the Eighth Circuit's decision in this case is aligned with the Third Circuit's en banc decision in *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996), *petition for cert. pending* (No. 96-1231), and at odds with the en banc Fifth Circuit decision in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (3d Cir. 1996). As pointed out in the petition, the remaining circuits are also divided, sometimes even within the circuit. Although respondent disagrees with exactly where particular circuit decisions fall along the continuum between *Sheridan* and *Rhodes*,[5] he agrees that "the precise breakdown of the circuits is

---

[5] For example, respondent takes issue with KARE's listing of the Sixth Circuit's decision in *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994) on the "pretext plus" side of the ledger. A careful reading of that court's decision reveals that KARE's listing is correct for a case such as Ryther's. In *Manzer*, the court noted that there are different types of evidence which can be offered to show pretext, and did state that, in some cases, the evidence of pretext will be such that a plaintiff will not need to offer additional evidence beyond pretext to prove intentional discrimination. *Id.* at 1084. But the Sixth Circuit also clearly stated that where pretext is shown by an indirect challenge to the employer's credibility, as Ryther attempted here, a plaintiff must offer some specific evidence of age discrimination in addition to the evidence of pretext. *Id.* at 1084-85.

not germane," Br. in Opp. at 13, and he does not dispute that the issue is causing confusion. In fact, it has resulted in a split among the circuits deep and pervasive enough for three circuits to have addressed the issue en banc in less than a year and to have reached different conclusions. The confused nature not only of the state of the law among the circuits but within this very decision of the en banc Eighth Circuit is demonstrated in many ways, but none more telling than the fact that both the petitioner and the respondent in *Sheridan* have each cited the Eighth Circuit en banc majority decision as supporting their own diametrically opposing views of the correct state of the law. *See* Respondent's Brief in Opposition in No. 96-1231 at 8; Petitioner's Reply Brief in No. 96-1231 at 2.

CONCLUSION

What all this demonstrates, of course, is that an important federal legal standard which ought to be applied uniformly throughout the circuits is in need of clarification by this Court, both for judgment as a matter of law and for jury instructions. For the foregoing reasons and the reasons set forth in the petition, a writ of certiorari should be granted.

Respectfully submitted,

Dated: May 2, 1997

THOMAS W. TINKHAM
Counsel of Record
MICHAEL J. WAHOSKE
KATHERINE McCONAHAY NEALON
DORSEY & WHITNEY LLP
220 South Sixth Street
Minneapolis, Minnesota 55402
Telephone: 612-340-2600

Attorneys for Petitioners